IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 806

ARTHUR WERKING,

Plaintiff-Appellee,

— against —

AMITY ESTATES, INC., RALPH SPOOR, Treasurer of Greene County and GREENE COUNTY,

Defendants-Appellants,

THE BOARD OF SUPERVISORS OF GREENE COUNTY, brought in as a party to answer the counterclaim of the defendant AMITY ESTATES, INC., herein,

Defendant-Appellant.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE PETITION FOR A REHEARING.

Petitioners respectfully move for leave to file the annexed petition for rehearing of the order of this Court entered April 22, 1957 denying the petition for writ of certiori in this case and dismissing the appeal. Rehearing is sought at this time upon the matters pointed out in the annexed petition.

Dated, May 10, 1957.

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants.

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel

FRANCIS A. RUF,
County Attorney of Greene County,
2 Franklin Street,
Catskill, N. Y.,
For other Appellants,
Of Counsel.

Petition for Rehearing of Order Denying Certiorari and Dismissing Appeal.

INTRODUCTION

Petitioners pray for a rehearing of the order of April 22, 1957 in this cause. The decision is attached as Appendix A.

REASONS FOR GRANTING REHEARING

Since the submission of the jurisdictional statement, this Court decided the case of United States of America, *petitioner* v. *Ohio Power Company* 353 U. S. —, holding the power to grant rehearing is consistent with the interest of justice.

In the cause at bar such situation exists in view of the decision of the New York Court of Appeals in *Lucio* v. *Curran et al.* 2 N. Y. 2d. 157, 157 N.Y.S. 2d. 948 (subsequent to the Werking case) which by a divided Court upholds the principle set forth in Wigmore on Evidence, sec. 2415, that a releasor expressive of a jural act is conclusively bound thereby; that his mind never gave assent to the terms is immaterial.

The effect of this decision is an admission by the Court of Appeals that with reference to a consummated transaction, the matter is final. Conceding arguendo that such transaction could be upset, it would require the necessity of a plenary action establishing by conclusive evidence mutual mistake or fraud, neither of which exists in the instant case. The action by appellee was to cancel a tax-deed because of antecedant failure on the part of the town col-

lector. There was no case or cause of action set forth or attempted to be proved, attacking the transaction between Werking and Amity.

This vacuum presents a situation of failure of due process even stronger than *Covey* v. *Town of Somers* 350 U.S. 882, 76 S. Ct. 138; 351 U.S. 141, 76 S. Ct. 724 and *Nelson* v. *City* 351 U.S. 930, 76 S. Ct. 786. There the proceeding or action by allegation and pleading presented a case for a tax title and the failure of due process consisted of lack of jurisdiction of the person by failure of process or due notice. In the case at bar the failure of due process is pre-eminent because of the non-existence of any jurisdiction over the subject matter. At most it might be said that the decision of the Court of Appeals as to the levy of the tax and the consummated agreement is dicta and unenforceable as any phase of an adjudication by reason of failure of due process.

The absence of any enforceable power of adjudication, in the failure of due process, renders nugatory the decision appealed from.

Again assuming arguendo, Amity's tax title was rendered void by reason of the town collector's failure to post, the interest to it conveyed by appellee under the cosummated agreement made its title full and complete. The agreement was not executory but completed under the evidence, the findings and the letter dated May 22, 1954. Appellee released his interest, occupied the premises as tenant for the specified one month and paid his rent therefor. To upset such transaction without pleading or action is an impairment of contract as well as failure of due process.

This Court's decisions of May 6, 1957—Rudolph Schware, petr., v. Board of Bar Examiners of the State of New Mexico, No. 92; Raphael Konigsberg, petr., v. The State Bar of California and The Committee of Bar Examiners of the State Bar of California, No. 5, uphold the power of this Court to explore the area of lack of proof in a State Court action which presumably includes the lack of allegations or proceedings to adjudicate.

This area must include the various unrelated tax levies erroneously voided dehors the scope of the action.

CONCLUSION

FOR THE FOREGOING REASONS, WE BELIEVE THAT THE MOTION SHOULD BE GRANTED.

Respectfully submitted,

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants.

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel.

FRANCIS A. RUF,
County Attorney of Green County,
2 Franklin Street,
Catskill, N. Y.
For other Appellants,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds in Rule 58, of the rules of this Court.

HERMAN G. BLUMENTHAL,
280 Broadway,
New York 7, N. Y.,
Counsel for Appellants.

ABRAHAM H. WAISMAN,
38 Park Row,
New York 38, N. Y.,
In behalf of AMITY ESTATES, INC.,
Of Counsel.

FRANCIS A. RUF,
County Attorney of Green County,
2 Franklin Street,
Catskill, N. Y.,
For other Appellants,
Of Counsel.

APPENDIX A

SUPREME COURT OF THE UNITED STATES

April 22, 1957.

Re: *Amity Estates, Inc., et al.* v. *Werking*,
No. 806, October Term, 1956:

"PER CURIAM: The appeal is dismissed for want of a substantial federal question. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied."